

**Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

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**In the Matter of**

**Distribution of the 2010-2013  
Cable Royalty Funds**

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**Docket No. 14-CRB-0010-CD (2010-13)**

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**In the Matter of**

**Distribution of the 2010-2013  
Satellite Royalty Funds**

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**Docket No. 14-CRB-0011-SD (2010-13)**

**MPAA REPLY BRIEF REGARDING DISCOVERY**

As required by the April 12 and April 13, 2016 Orders (“April Orders”) issued by the Copyright Royalty Judges (“Judges”), the Motion Picture Association of America, Inc., on behalf of its member companies and other producers and distributors of syndicated programming, movies, specials, and non-team sports programs aired on broadcast stations retransmitted by cable and satellite operators (collectively, “MPAA”), hereby submits its reply brief regarding discovery issues related to the 2010-13 cable and satellite royalty funds (“2010-13 Funds”).<sup>1</sup>

**INTRODUCTION**

This dispute concerns whether a participant in a royalty distribution proceeding is required to provide, to opposing parties, the most basic of information about its claims – that is, the identity of the claimants it purports to represent and their related works. The barrage of

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<sup>1</sup> MPAA’s reply responds to opposing briefs filed on May 18, 2016 by the Joint Sports Claimants (“JSC”), the Public Television Claimants (“PTV”), the National Association of Broadcasters (“NAB”) and the Broadcaster Claimants Group (“BCG”), the Canadian Claimants Group (“CCG”), the Settling Devotional Claimants (“SDC”), National Public Radio (“NPR”), and the Music Claimants (“Music”) (collectively “Opposing Parties”).

opposing views notwithstanding, there is no question that it does. Accordingly, the arguments and principles that underlie the discovery sought by MPAA are sound, and justify the Judges upholding MPAA's discovery requests ("MPAA Requests") in these proceedings.

*First*, the entire statutory licensing scheme exists to compensate eligible copyright owners for the use of their works on distantly retransmitted broadcast signals. *See* 17 U.S.C. § 111(c)(1); 17 U.S.C. § 119(a)(1); 69 Fed. Reg. 3606, 3614 (Jan. 26, 2004). The Judges are authorized under the Copyright Act (the "Act") to effectuate this purpose. *See* 17 U.S.C. § 801(b)(1)(C). However, neither the Copyright Office, nor the Judges, actually vet the claims filed for eligibility.<sup>2</sup> Because each participant here seeks a portion of the finite pools of royalties attributable to the 2010-13 Funds, each such opposing party has a right, and a duty to its represented claimants, to discover the other parties' basic eligibility information in order to weed out ineligible claims.<sup>3</sup> The MPAA Requests are consistent with these principles.

*Second*, the MPAA Requests go directly to the fundamental, threshold issue of eligibility, which necessarily must be resolved *before* the Judges consider any participant's allocation methodology.<sup>4</sup> Although Opposing Parties argue that permitting the MPAA Requests somehow constrain their *future* methodological presentations and foretells the methodology the Judges will favor in this proceeding, this position is wholly meritless and conflates the issues. For the present purpose, the MPAA Requests go to the issue of eligibility. MPAA has neither proposed

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<sup>2</sup> *See* Memorandum Opinion And Ruling On Validity And Categorization Of Claims, Docket No. 2012-6 CRB CD 2004-2009 *et al.*, at 5 (March 13, 2015) ("March 13, 2015 Order") ("In the absence of evidence to challenge the honesty or correctness of the certification, the Judges do not look behind a timely filed claim to confirm the filing party's authority."); Memorandum Opinion And Order Following Preliminary Hearing On Validity Of Claims, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 4 (March 21, 2013) ("March 21, 2013 Order") ("The CRB does not go behind the filings to ascertain the scope of an agent's authority to assert a joint claim.").

<sup>3</sup> *See* Ruling And Order Regarding Claims, Docket No. 2008-1 CRB CD 98-99 (Phase II) at 9-11 (June 18, 2014) ("June 18, 2014 Order") (recognizing the duty of opposing parties to monitor and expose misconduct related to Raul Galaz and Independent Producers Group in royalty distribution proceedings).

<sup>4</sup> *See* March 14 Orders at 1-2; *see also* Order Denying Motions To Strike Claims, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2 (Sept. 14, 2012).

any methodology for allocating royalties, nor has it proposed abolishing any particular methodological approach. Indeed, Opposing Parties remain free to present their methodologies as they have always done in their Written Direct Statements, including methodologies relying upon the Agreed Categories.

*Third*, the question of whether the Judges are bound by the Copyright Royalty Tribunal's ("CRT") treatment of so-called "unclaimed funds" in the 1978 Cable Distribution Proceeding is premature, as that determination deals principally with the allocation of royalties, which is a methodology issue. In any event, Opposing Parties are simply incorrect that the Judges are bound by the outdated CRT decision, which *inter alia*, by its language makes clear that it is not precedential.

*Fourth*, due process principles underlie the MPAA Requests. MPAA has the right to explore the relative market value of the aggregate of actual claimed works among the Agreed Categories. Because MPAA cannot perform this task without information about eligible claimants and their claimed works, denying the MPAA Requests would not only be arbitrary and capricious, it would trigger a violation of due process to MPAA. Moreover, Opposing Parties' due process arguments are completely misplaced: a decision by the Judges to uphold the MPAA Requests would not deny *them* due process, as they remain free to present their preferred methodological approaches in these proceedings.

## **ARGUMENT**

### **I. MPAA's Requests Are Relevant And Not Unduly Burdensome.**

As explained in MPAA's Further Briefing Regarding Discovery ("MPAA Further Briefing"), at 10-13, the MPAA Requests are relevant, both to determining the eligibility of each claimant seeking a share of the 2010-13 Funds, and to determining the eligibility and proper

categorization of each work for which those claimants are seeking to collect such royalties.

Because all participants are seeking relative percentage shares of the 2010-13 Funds, “all copyright royalty claimants are ‘opposing parties’ to all other claimants, since any party’s claim potentially could reduce any other party’s claim for a portion of the finite fund.” *See* Amended Joint Order On Discovery Motions, Docket No. 2012-6 CRB CD 2004-2009 (Phase II), *et al.* at 5 (July 30, 2014) (“July 30, 2014 Order”). If other program categories are bloated with ineligible claimants or ineligible works, distributed royalties would flow to those undeserving claimants.

The Judges have placed the onus on the participants in royalty distribution proceedings to vet cable and satellite royalty distribution claims. *See text supra*, at 2 and n.2-3. The MPAA Requests are consistent with that duty. Moreover, the information obtained would place MPAA in a position to evaluate the validity of claimants and works within the Agreed Categories.<sup>5</sup> Clearly, the MPAA Requests are relevant to MPAA’s position in these proceedings.

Opposing parties go to great lengths to catalogue a parade of horrors that they believe would result from responding to the MPAA Requests, but they offer no credible evidence to support their arguments, especially since MPAA only seeks the most basic eligibility information imaginable. Nor do they provide, as ordered by the Judges in the April Orders (at 2-3), reasonable alternatives to the MPAA Requests. Given that Opposing Parties have all received partial distributions of royalties from the 2010-13 Funds, it is entirely reasonable to expect them to be able to readily identify, at a minimum, the particular claimants who received partial distributions and the actual works for which they received those distributions, on a royalty-year basis. That baseline expectation remains valid even if the distributions made to their claimants

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<sup>5</sup> The record before the Judges in recent Phase II proceedings demonstrates that the internal processes employed by some of the Opposing Parties for vetting claims are, in fact, ineffective, or, in some cases, nonexistent. *See* Docket No. 2012-6 CRB CD 2004-2009 *et al.*, Tr. Vol. 4 at 208-82 (Dec. 11, 2014) (Kowalski) (testifying on behalf of Bob Ross, Inc.).

were not made on a work-by-work basis. Opposing Parties therefore have no basis to claim that it is a burden to provide such basic information.

Finally, MPAA supports the adoption of presumptions of validity in this proceeding, provided that any such presumptions are rebuttable and do not serve as a bar to reasonable discovery requests designed to enable parties to test whether the presumption can be reasonably applied to each participant. *See* MPAA Further Briefing at 15-16. If any party is either unable or unwilling to disclose the claimants that they have authority to represent and the particular works associated with those authorized claimants, or some equivalent eligibility documentation, then the Judges should not afford that party's claims a presumption of validity in this proceeding.

## **II. Opposing Parties' Attempts To Conflate Eligibility Issues And Allocation Issues Are Unavailing.**

Opposing Parties spend an inordinate amount of time arguing that their yet-to-be-presented methodologies will be affected in some inexplicable way by the Judges' decision on the instant discovery matter. However, this attempt to conflate eligibility and allocation issues is both premature and entirely misplaced. Simply put, the eligibility inquiry goes to the issue of which claimants and works are entitled to royalties, while the allocation inquiry goes to how the Judges should allocate those royalties among eligible claimants and works in the context of the Agreed Categories. Granted, MPAA may incorporate the information it obtains in discovery in its methodology presentation, but engaging in a debate *now* about the merits of a methodology that may be presented in the *future* is pointless.

## **III. No Precedent Or Stipulation Precludes The Judges From Allowing The Basic Eligibility Discovery Sought By MPAA In This Proceeding.**

MPAA has not yet advocated any particular methodology here, thus, the issue of whether the CRT ruling on the "unclaimed funds" issue in the 1978 Cable Distribution Proceeding

governs the discovery issue at hand is premature. Moreover, that determination, which was based on the record before the CRT in that particular proceeding, by its express terms was not precedential for future proceedings. *See* 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980). The fact that the parties voluntarily adopted the determination in subsequent proceedings via stipulation does not elevate it to binding precedent, especially where, as here, there is no stipulation in place among the parties *in this proceeding* addressing the issue.<sup>6</sup> Notably, although the parties requested it in a prior Phase I proceeding, the Judges have *never* adopted the parties' proposed stipulation regarding unclaimed funds. *See* 75 Fed. Reg. 7703, 77064-65 at n. 12 (Sept. 17, 2010) (ruling that the parties' "motion is denied."). Accordingly, the so-called "unclaimed funds" CRT determination is not binding here.

Even if that CRT ruling were considered precedential, Opposing Parties fail to explain why it should bar the MPAA Requests, which are rooted in the statutory mandate. If, alternatively, their contention lies with the Judges' elimination of the Phase I/Phase II format, that too is fully consistent with law: the Judges must take precedent into account, but "are free to depart from precedent if they provide reasoned explanations for their departures." *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 762 (D.C. Cir. 2009); *see also Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1014 (D.C. Cir. 2014). As Librarian of Congress observed "[i]t would make little sense to require the CARPs to apply Tribunal [and CARP] precedent in all circumstances, and allow no deviation, especially in the

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<sup>6</sup> While the parties' past stipulations may be "law of the case" within past proceedings, they do not bind the current proceeding concerning the 2010-13 Funds, which relates to completely different sets of eligible copyright owners, eligible works, and participating parties. *See* June 18, 2014 Order at 14; Order On Motion By Joint Sports Claimants For Section 801(C) Ruling, Or, In The Alternative, A Paper Proceeding In The Phase I Sports Category, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2 (May 17, 2013).

area of determining the relevant factors for distributing royalties.” 69 Fed. Reg. at 3614. Indeed, the Judges have departed from precedent on more than one occasion in recent proceedings.<sup>7</sup>

Here, the Judges already provided a reasoned explanation for their departure from the Phase I/Phase II format in this proceeding.<sup>8</sup> Moreover, given the pervasive nature of recent eligibility issues spanning multiple categories, and some parties’ troubling concessions that they do not plan to address them in the course of their presentations to the Judges,<sup>9</sup> good cause exists for permitting the MPAA Requests. Moreover, the Act grants the Judges authority to make “any necessary procedural or evidentiary rulings” required in the course of royalty distribution proceedings. 17 U.S.C. § 801(c). Clearly, the Judges are within their authority to require the eligibility discovery MPAA seeks from all participants to these proceedings.

#### **IV. MPAA Would Be Denied Due Process If Its Discovery Requests Are Not Permitted.**

If the Judges preclude MPAA from conducting discovery related to eligibility, it would actually amount to a denial of the due process owed to MPAA in this proceeding. *See Hous. Auth. of Cty. of King v. Pierce*, 711 F. Supp. 19, 22 (D.D.C. 1989) (““Discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.””) (citations omitted). As stated, the MPAA Requests are relevant, not only to eligibility, but also to any methodology that would consider relative market value of actual claimed works. Seeking such discovery is not inconsistent with MPAA’s support for using the Agreed Categories. Also, supporting such use does not amount to a stipulation regarding the

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<sup>7</sup> *See* Order Directing Accounting Of 2000-2003 Cable Royalties Disbursed To The Program Suppliers Category, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) (November 25, 2015) (declining to follow prior precedent precluding the imposition of retroactive interest on royalty awards); March 21, 2013 Order at 3-4 and 5 (declining to follow prior precedent regarding “placeholder claims”).

<sup>8</sup> *See* Notices of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order, at 2, n.5, and 3 (November 25, 2015 and December 2, 2015).

<sup>9</sup> *See, e.g.*, Responsive Brief Of The Public Television Claimants On Discovery Issues at 6-7.

eligibility of particular claimants or works, or what methodological approach the parties would employ in this proceeding.<sup>10</sup> MPAA has a duty to its represented claimants, and a right, to vet the claims and works presented in these proceedings for eligibility. If the Judges permit any participant a categorical exemption from *any* discovery regarding eligibility, MPAA will be unable to determine the extent to which the royalty allocation awarded to any such participant is inflated by ineligible claims and their associated ineligible works. Such an exemption would effectively deny MPAA the opportunity both to eliminate ineligible claims, and to construct a methodology of its own choosing regarding actual claimed works in this proceeding. Thus, MPAA's position in this proceeding would be directly prejudiced by the denial of discovery concerning eligibility issues.

In sharp contrast, Opposing Parties' due process arguments are nothing but smoke and mirrors. As an initial matter, it is unclear exactly what *legal standard* Opposing Parties claim to have relied on to give rise to a violation of due process should MPAA be permitted to proceed with discovery here.<sup>11</sup> The eligibility requirements in the Act have remained constant over the

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<sup>10</sup> JSC's argument that MPAA is estopped from "changing its position and urging the Judges to reject [the Unclaimed Funds Ruling]" is a red herring. MPAA's position is that only eligible copyright owners are entitled to receive a royalty distribution for eligible works – and that position has not changed since the 1978 Cable Distribution Proceeding. See JSC Brief, Exhibit A at 9; see also *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) ("For judicial estoppel to apply, . . . a party's later position must be clearly inconsistent with its earlier position. Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits.") (emphasis added) (internal quotations and citations omitted). Further, even if the Judges were to credit as accurate JSC's misguided characterization of MPAA's position, judicial estoppel does not apply where, as is the case here, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." *Mingo Logan Coal Co. v. United States EPA*, 70 F. Supp. 3d 151, 174 (D.D.C. 2014) (finding that it would be inappropriate to judicially estop the EPA from changing positions on the adequacy of mitigation measures contained in a party's permit where "a change in facts and regulatory policy . . . occurred subsequent to issuance of the permits at issue in [an earlier case].") (internal quotations omitted).

<sup>11</sup> Due process requires "that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard." *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005) (citing *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981)).



years, and no party disputes that they apply in this proceeding.<sup>12</sup> Moreover, Opposing Parties have been on notice that the same eligibility standards applied to both Phase I and Phase II proceedings since at least 2006, when the Judges declined to adopt the Phase I Parties' proposal for regulatory changes that would have established different eligibility requirements for Petitions to Participate filed in connection with Phase I and Phase II proceedings.<sup>13</sup> In addition, the parties were on notice of the Judges' rulings regarding the scope of discovery in royalty distribution proceedings and the non-precedential effect of the parties' prior stipulations for future proceedings before the current proceedings regarding the 2010-13 Funds were commenced.<sup>14</sup>

Finally, allowing the MPAA Requests would not constitute a new legal standard. The Judges will determine in due course whether MPAA's use of the discovered information merits consideration and weight. Due process does not require the Judges to give parties advance notice of the weight that they will apply to any particular piece of evidence presented in a particular proceeding. *See Program Suppliers*, 409 F.3d at 402. Because the Judges have not articulated a new legal standard here, Opposing Parties' due process contention is without merit.

## CONCLUSION

For all of the foregoing reasons, the MPAA Requests are appropriate, and should be upheld by the Judges as to all proceeding participants.

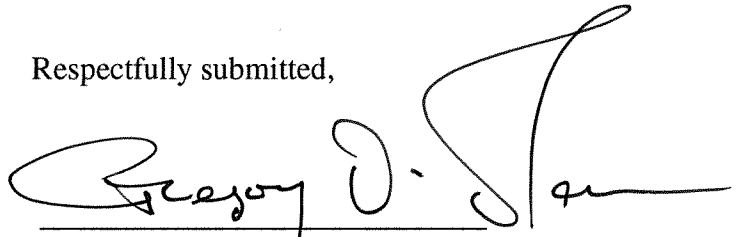
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<sup>12</sup> *See, e.g.*, Responsive Brief Of The Joint Sports Claimants at 7 ("JSC agree that royalties may be distributed only to parties having valid claims.").

<sup>13</sup> *See Comments Of The Copyright Owners On The Copyright Royalty Board Regulations*, Docket No. RM 2005-1, at 10-12 (November 13, 2006).

<sup>14</sup> The Judges first requested Petitions to Participate regarding the 2010-12 Funds on December 22, 2014. *See* 79 Fed. Reg. 76396 (Dec. 22, 2014). However, the Judges issued their ruling interpreting the meaning of the term "opposing parties" in the Judges' regulations, and the scope of discovery in royalty distribution proceedings, on July 30, 2014. *See* July 30, 2014 Order at 5, 9. In addition, the Judges issued their orders concluding that the parties' prior stipulations were "law of the case" only within the particular proceedings in which they were adopted even earlier. *See supra* at n.6.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregory O. Olaniran", written over a horizontal line.

Gregory O. Olaniran

D.C. Bar No. 455784

Lucy Holmes Plovnick

D.C. Bar No. 488752

Alesha M. Dominique

D.C. Bar No. 990311

MITCHELL SILBERBERG & KNUPP LLP

1818 N Street, N.W., 8th Floor

Washington, D.C. 20036

Telephone: (202) 355-7917

Fax: (202) 355-7887

goo@msk.com

lhp@msk.com

amd@msk.com

Dated: May 25, 2016

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of May, 2016, a copy of the foregoing pleading was sent by Federal Express overnight mail to the parties listed on the attached service list.

*Lucy Holmes Plovnick*  
Lucy Holmes Plovnick

## **SERVICE LIST**

### **JOINT SPORTS CLAIMANTS**

Robert Alan Garrett  
Sean Laane  
Michael Kientzle  
ARNOLD & PORTER LLP  
601 Massachusetts Avenue, N.W.  
Washington, D.C. 20001

### **SETTLING DEVOTIONAL CLAIMANTS**

Clifford M. Harrington  
Matthew J. MacLean  
Victoria N. Lynch  
PILLSBURY WINTHROP  
SHAW PITTMAN LLP  
1200 Seventeenth Street NW  
Washington, DC 20036

### **SETTING DEVOTIONAL CLAIMANTS/PROFESSIONAL BULL RIDERS**

Arnold P. Lutzker  
Benjamin Sternberg  
LUTZKER & LUTZKER LLP  
1233 20th Street, NW  
Suite 703  
Washington, DC 20036

### **PUBLIC TELEVISION CLAIMANTS**

### **COMMERCIAL TELEVISION CLAIMANTS**

### **NATIONAL ASSOCIATION OF BROADCASTERS**

### **BROADCASTER CLAIMANTS GROUP**

Ronald G. Dove, Jr.  
Lindsey Tonsager  
Dustin Cho  
COVINGTON & BURLING LLP  
One City Center  
850 10th Street NW  
Washington, DC 20001

John I. Stewart, Jr.  
Ann Mace  
CROWELL & MORING LLP  
1001 Pennsylvania Ave., NW  
Washington, DC 20004-2595

## **MUSIC CLAIMANTS**

### **AMERICAN SOCIETY OF COMPOSERS, BROADCAST MUSIC, INC. AUTHORS AND PUBLISHERS**

Samuel Mosenkis  
Jackson Wagener  
ASCAP  
One Lincoln Plaza  
New York, NY 10023

Joseph J. DiMona  
BROADCAST MUSIC, INC.  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007-0030

Michael J. Remington  
Jeffrey J. Lopez  
Brian Coleman  
Jennifer T. Criss  
DRINKER BIDDLE & REATH LLP  
1500 K Street, NW – Suite 1100  
Washington, DC 20005

### **SESAC, INC.**

John C. Beiter  
SHACKELFORD, BOWEN, MCKINLEY &  
NORTON, LLP  
47 Music Square East  
Nashville, TN 37203

## **CANADIAN CLAIMANTS**

L. Kendall Satterfield  
FINKELSTEIN THOMPSON LLP  
1077 30th Street NW  
Washington, DC 20007

Victor Cosentino  
LARSON & GASTON LLP  
200 S. Los Robles Avenue, Suite 530  
Pasadena, CA 91101

## **MULTIGROUP CLAIMANTS SPANISH LANGUAGE PRODUCERS**

Brian D. Boydston  
PICK & BOYDSTON LLP  
10786 Le Conte Avenue  
Los Angeles, CA 90024

## **NATIONAL PUBLIC RADIO**

Jonathan D. Hart  
Gregory A. Lewis  
NATIONAL PUBLIC RADIO  
1111 North Capitol Street, NE  
Washington, DC 20002

## **MAJOR LEAGUE SOCCER**

Edward S. Hammerman  
HAMMERMAN PLLC  
5335 Wisconsin Ave., Suite 440  
Washington, DC 20015-2054